U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7500
(202) 692-7365 (FAX)

IN THE MATTER OF	:	
	:	Dated: October 17, 2000
MICHAEL POTTER	:	
Claimant	:	Case No. 1999-DCW-0005
	:	OWCP No. 40-11670
v.	:	
	:	
WASHINGTON GAS LIGHT CO.	:	
Employer	:	
	:	
and		:
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS	:	
Party-in-Interest	:	

Kirk D. Williams, Esq.
Washington, DC
For the Claimant

Stephen J. Price, Esq.
Washington, DC
For the Employer

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation for temporary total and permanent partial disability arising under the Longshore and Harbors' Compensation Act, 33 U.S.C. 901 *et seq*., as extended by the District of Columbia Workers' Compensation Act (hereinafter jointly referred to as "the

Act").[1] A formal hearing was held on October 13, 1999 in Washington, DC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

Claimant is 57 years old, is married, and has three children who, at the time of the hearing, were 22, 21 and 17 years old. He testified that he started working for Washington Gas in 1964 (TR 28), then left after two years to go to school. He received an associate's degree from Santa Monica (California) City College in 1968, and at some point also completed a program in drafting at Columbia Tech in Virginia (TR 75-76).[3] He returned to the employ of Washington Gas in 1968, left two years later in an unsuccessful attempt to open a restaurant, and returned to Washington Gas either late in 1970 or in 1971 (TR 28). On January 5, 1976, claimant was employed as a foreman out of Washington Gas's Springfield, Virginia office (CX 1). While working on a cathodic protection project in Washington, DC, claimant slipped down an embankment and fell about 50 feet, suffering an injury to his back (TR 30). Claimant continued to work for some time, but eventually a laminectomy was performed by Dr. Cooney, a neurosurgeon, in July 1976 (TR 36-38). After some periods of disability, claimant was ready to return to work on a regular basis at the end of September, 1977. Since his injury prevented him from returning to his previous job, he was offered the position of a staff assistant in the Springfield office, a position which was within claimant's physical capabilities, with no loss in pay (TR 41-42; CX 1, 2). The problem, however, was that claimant's residence in Germantown, Maryland was about 35 miles from the Springfield office, and Dr. Cooney restricted the claimant from driving more than 50 miles a day (CX 2). Employer made it clear that this was the only position it had available for the claimant, and asked him whether he planned to move his residence closer to Springfield so that he could take the job and still satisfy his doctor's restrictions or face termination (*id*.). Claimant and company officials met on October 4, 1977 to try to resolve this impasse. Claimant ultimately decided to accept the staff assistant position without relocating his residence despite the fact that the commute exceeded his doctor's restrictions, testifying that he needed the job (TR 40-41). Although the claimant was being paid at the same rate of pay as a staff assistant as he was as a foreman prior to his injury, and a back injury is not a scheduled injury under §8(c) of the Act, the parties entered into a stipulation on May 3, 1978 in which the

---

[1]The D.C. Act was repealed effective July 24, 1982. Claims arising prior to that date, however, are still governed by its provisions. *See, e.g., Garrett v. Washington Air Compresssor Co.*, 466 A.2d 462, n.1 (D.C. 1983). Although the Longshore Act was amended in 1984, those amendments do not apply to the D.C. Act, since the D.C. Act was repealed prior to the 1984 amendments to the Longshore Act. *See Keener v. WMATA*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

[2]Citations to the record of this proceeding will be abbreviated as follows: CX – claimant's Exhibit; EX – Employer's Exhibit; TR – Hearing Transcript.

[3]It is not clear from the record whether he attended the drafting course before or after he obtained his associate's degree.

employer agreed to pay claimant continuing compensation for a 25% permanent partial disability to his back based on an average weekly wage of $412.09 (CX 3). Employer is not contending that this stipulation should be abrogated.

Claimant worked without taking any time off due to his back condition, commuting between 45 minutes and an hour each way (TR 206), until sometime in 1979, when he moved to a new residence. But instead of moving closer to Springfield, to decrease his commute, he moved to Damascus, Maryland, which is even farther from Springfield.[4] Claimant's testimony reveals that there was no overriding reason for his moving to Damascus, and he could just as well have moved closer to Springfield (TR 84-92). Although he stated that he and his wife looked at homes in Northern Virginia and found them to be more expensive than in Damascus, this testimony lacks conviction. He offered no examples of where he looked for houses in Northern Virginia or of the prices of those houses, and there is no reason to assume that in 1979 the housing markets in, for example, Prince William or northern Stafford counties in Virginia, which are within 25 miles of Springfield, would have been significantly different from northern Montgomery County, Maryland, where Damascus is located. Instead, it appears that the length of his commute to work was of no particular concern to the claimant despite Dr. Cooney's driving restriction.

Claimant continued to work regularly through October 1, 1982 (CX 4). Nevertheless, claimant testified that the drive to and from work "started to get to wear on me" (TR 43), requiring him to see Dr. Cooney on several occasions. Then, beginning in October, 1982, claimant testified that he started taking time off from work due to increasing back pain (TR 44-45; CX 4). At that time he started seeing Dr. Luessenhop, a neurosurgeon at Georgetown University Hospital (TR 44-46; CX 5). On March 15, 1983, Dr. Luessenhop wrote a letter to the employer in which he recommended that claimant limit his driving to no more than 12-15 miles at a time and no more than 30 miles a day (CX 5). In an April 21, 1983 response to employer's follow-up letter, Dr. Luessenhop stated that "[i]t would be possible for Mr. Potter to commute to work if he were to stop for a rest period every 12-15 miles." (*Id.*) When employer received Dr. Luessenhop's initial restriction letter, claimant was informed that if he did not take action to meet Dr. Luessenhop's restrictions, then it would become necessary to terminate him effective April 25, 1983 (CX 6).[5] That date was extended to June 13, 1983, but when the problem still had not been resolved claimant was terminated (CX 7). In 1984, apparently in July (*see* EX 3; TR 53, 66), claimant underwent another laminectomy. Although he had – and still has – occasional symptoms since recovering from this operation, claimant has rarely seen a doctor for his back condition since 1984, and only occasionally takes medication for it (EX 10, at 9, 14-15; TR 54).

---

[4]Claimant estimated that Damascus was "seven miles, something like that ..." north of Gaithersburg (and thus seven miles further from Springfield, Virginia). TR 84.

[5]This was similar to the ultimatum claimant received in 1977, which was resolved when claimant agreed to return to work despite the fact that his commute exceeded his doctor's restriction. There is nothing in the record which indicates that employer would not have permitted the claimant to return to work despite the restriction, as it did in 1977.

Claimant was receiving compensation for temporary total disability beginning on February 2, 1983 and throughout the period where his status was being assessed. These payments continued after claimant's termination through August 15, 1993, a total of $150,742.66, at which time employer became aware of claimant's work for MTM Management Associates and cut off his compensation.

MTM Management Associates

In 1978, claimant, his wife, and another person who soon dropped out of the picture started MTM Management Associates as a partnership (TR 56).[6] MTM is engaged in real estate management. It manages community associations and condominium associations, for which it gets paid on a per unit basis (TR 97). Claimant has been the president of MTM from the beginning, although he states he was made president to give the business a male image, there being few women in property management at that time (TR 64). In actuality, claimant states, MTM was his wife's business, and he merely helped out a bit and was not paid (TR 56-64). When the business started, MTM managed two communities, and claimant testified that he put in an hour or two a week (TR 59). By 1983, about the time he stopped working for employer, MTM managed four or five properties, and claimant testified that he spent about six to seven hours a week working for MTM (TR 65). Between 1985 and 1989, MTM grew to the point that it was managing 10-11 properties, necessitating the hiring of two secretaries (TR 114). During this period, claimant also was spending more time performing work for MTM, attending association meetings, doing site inspections, soliciting bids from vendors, writing letters regarding violations of restrictive covenants, securing payments from delinquent property owners, bidding on management contracts, and other tasks (TR 116-46). In a February 28, 1989 bid to manage a condominium signed by the claimant, it is stated that claimant and his wife have combined property management experience of over 30 years (EX 16; *see also* TR 147).

Claimant testified that in 1989 he was spending between five and ten hours a week working for MTM (TR 199). But claimant was not a credible witness. He repeatedly attempted to minimize his role with MTM, only to be forced to admit to a more expansive role (*see, e.g.*, TR 110-12, 120-23, 137-38, 152, 164). He was also less than candid testifying about the amount of driving he does, how he happened to start receiving a salary from MTM, and the jobs he applied for since 1983 (TR 69, 169-70, 178-80, 194-95). It is clear that the amount of time claimant was spending working for MTM increased as MTM's business grew. Although claimant did not receive a salary for his work for MTM until 1997, had he not performed this work MTM would have had to pay someone else to do it, reducing its profits and possibly the salary his wife paid herself from the business. And since his wife was the sole shareholder of the business, he directly benefitted from MTM's profits as well as his wife's salary.

Claimant testified that MTM now has gross earnings of $230,000 a year (TR 174). Claimant started receiving a salary from MTM in 1997, and in 1998 was paid $52,000, $2000

---

[6]Subsequently, MTM was incorporated.

more than his wife's salary (CX 9). Mary Potter previously had been paying herself $60,000 a year. On direct examination, claimant testified that he started receiving a salary in 1997 because his wife could not afford to pay him prior to that time (TR 69), and later added that he had no idea how the idea to pay him a salary developed (TR 178). But he admitted under cross-examination that the reason he started receiving a salary was that it came to his and his wife's attention that, by not collecting a salary since 1983, his Social Security benefits would be low (TR 179-80). Therefore, he started receiving a salary not because his duties changed or MTM's financial picture changed, but because he and his wife wanted him to become eligible for higher Social Security benefits. The record establishes that, just through his wages in 1997 and 1998, claimant raised his future Social Security payments by $323 a month if he retires at age 62, and by $560 a month if he retires at age 66 (*see* CX 10; EX 9).

Nature and Extent of Disability

From the time the claimant returned to work following his first back operation until October, 1982, claimant worked regularly. He was physically capable of performing his job; in fact, he testified that performing his job duties as a staff assistant was never a problem (TR 93). Moreover, he was able to drive to and from work despite the fact that his round-trip commute exceeded his doctor's restrictions by 20 miles while he lived in Gaithersburg and about 35 miles after he moved to Damascus.[7] He testified that the trip took him 45 minutes to an hour each way (TR 206), which is not a long commute in the Washington, DC area. Claimant testified that his back started bothering him enough beginning in October, 1982 so that he began taking time off from work because of it (TR 44-45), and since he had further back surgery in July, 1984 I believe his back was hurting him at that time. However, I do not believe his testimony that the source of this pain was sitting in his car from 45 minutes to an hour twice a day while he commuted to work, nor that his commute had become too painful to endure. For if his commuting was a problem one would think he would have tried to do something about it. Instead, when he relocated his residence he moved further from his office, lengthening his commute; there is no indication that he did anything, such as using additional back support, to make it easier to drive;

---

[7]It should be pointed out that both Dr. Cooney and Dr. Luessenhop's restrictions on claimant's driving, both of which limit him to driving a specific number of *miles* per day, are nonsensical. There does not seem to be any conceivable connection between the number of miles a person drives – as opposed to the *length of time* spent driving – and that person's back condition. Moreover, there are no medical reports in the record from either Dr. Cooney or Dr. Luessenhop which would provide a basis for their driving restrictions. In 21 years of hearing cases under the Act, I have never before encountered physicians imposing driving restrictions or any other restriction on sitting or operating an automobile based on anything other than the amount of time the claimant spends in that activity. Consistent with my opinion is Dr. Gordon's testimony that Dr. Luessenhop's driving restriction was "absurd" (EX 10, at 12), and that claimant could spend six to eight hours a day sitting (*id*. at 13). The record contains reports of Dr. Gordon's two examination of the claimant as well as his disposition testimony explaining his conclusions, and I find his opinion to be highly credible.

and he did not indicate that he attempted to locate someone to ride with all or part of the way, giving him more flexibility to move around while in the car. Further, since he did not attempt to return to work after February 1, 1983, he never tried to commute with a rest stop, as Dr. Luessenshop suggested he could. He based his failure to attempt to return to work after February 1, 1983 on the feeble excuse that he could not drive to work because he was taking medication, something which had not stopped him from commuting previously (TR 93-94) and apparently has not interfered with his driving subsequently (*e.g.*, TR 165-67, 170). Further, the record indicates claimant continued to play golf despite Dr. Luessenhop's recommendation that he not do so (TR 55-56; *see also* CX 5, Dr. Luessenhop's March 15, 1983 letter). Nevertheless, employer did not challenge the restrictions imposed by Dr. Luessenhop, and apparently accepted as fact that the claimant could no longer commute to Springfield. Since it had no other jobs closer to his residence to offer the claimant, employer begin paying the claimant compensation for temporary total disability.

Claimant clearly was temporarily and totally disabled from his July, 1984 surgery through January, 1985, six months after the surgery, at which point he should have reached maximum medical improvement (*see* EX 10, at 15-16, 21-22). But from February, 1985 onward, claimant has been capable of engaging in his staff assistant job at Washington Gas. I credit Dr. Gordon's opinion that the claimant had an excellent result from his second back operation and was capable from the time he reached maximum medical improvement of driving a car the distance required for him to get to work in Springfield (EX 10, at 11-13). That claimant's back did not, and does not, prevent him from driving from his residence to Washington Gas's office in Springfield is reflected by the fact that claimant drove his car frequently while engaging in his duties for MTM, and in the four years from 1994 to 1998 he drove his car approximately 90,000 miles (TR 170). Driving 90,000 miles in four years averages out to over 61 miles each and every day in those four years.

What appears to have happened is that MTM's business increased substantially from the time it began until 1983, and claimant decided he would rather work for MTM than commute 40 miles to work for Washington Gas. Since the employer was voluntarily paying him compensation for temporary total disability, he had absolutely no incentive to return to work for employer.

On July 2, 1985, claimant filled out a DOL Form 200, *Report of Earnings*, stating that from February 2, 1983 through June 25, 1985, his only earnings from employment were $4,733.20 from Washington Gas from February 2, 1983 through June 24, 1983 and $1,190.00 from a Washington Gas stock ownership plan during 1984 (EX 9). He filled out another LS 200 stating that from June 25, 1985 through December 31, 1991 he had no earnings from employment at all (*id*.). While literally true, neither form mentioned the work claimant did for MTM, which directly benefitted him by increasing the value of the business owned by his wife and, in all likehood, permitting his wife to pay herself a higher salary. It is unclear from the record how employer learned that the claimant was working for MTM, but on June 15, 1993 employer filed a Form LS-207 *Notice of Controversion of Right to Compensation* contending that it believes claimant had been employed full time as president of MTM since January 1, 1984 (CX 8).

Based on all of this, I find that the claimant was able to perform his work for employer and was not disabled from February 2, 1983 until his surgery in July, 1984; was temporarily totally disabled for six months – through the end of January, 1985 – following his July, 1984 surgery; and has been able to perform his work for employer and was not disabled thereafter. Even it claimant was not capable, following his second surgery, of engaging in his usual work, he has had a wage-earning capacity as a property manager since at least 1989, at which time it appears he was working full time for MTM. That he was not paid a salary by MTM until some time in 1997 was a decision by the claimant and his wife which does not reflect on claimant's contributions to the business or on his wage-earning capacity which, as is indicated by the salary claimant received staring in 1997, was substantial.[8]

Employer has requested a credit for the compensation it paid claimant from June, 1983 through August 13, 1993. Other than for the period from claimant's 1984 surgery until he reached maximum medical impairment, employer's request is appropriate. *See, e.g., Universal Maritime Service Corp. v. Spitabiere,* _____ F.3d _____, Docket No. 99-4175 (2nd Cir. Sept. 21, 2000). For the evidence establishes that claimant was capable of commuting to and performing his job at Washington Gas throughout this period. Accordingly, the compensation paid to the claimant during this period (other than the $68.72 per week due under the parties' 1978 stipulation) was paid erroneously.

Further, employer seeks sanctions under §8(j) of the Act, which requires a claimant to accurately report his earnings when requested to do so by the employer. Employer contends that the claimant violated §8(j) in his responses on the LS-200 forms he filed. However, §8(j) was added to the Longshore Act by the 1984 amendments and, as is stated in footnote 1 above, since the D.C. Workers' Compensation Act had already been repeated when the 1984 amendments were adopted, those amendments do not apply to the D.C. Act. Accordingly, the sanctions set out in §8(j) are inapplicable to this case.

ORDER

IT IS ORDERED that:

1. The claimant is entitled to compensation from the employer for temporary total disability from July 1, 1984 through January 31, 1985 based on an average weekly wage of $ 412.09. Credit shall be given for all previous payments of compensation since February 2, 1983 in excess of the compensation paid pursuant to the May 3, 1978 stipulation between the parties,

---

[8]But the salary claimant was paid by MTM is artificial, and not necessarily reflective of his wage-earning capacity. It is obvious that the salaries paid by MTM to both the claimant and his wife were designed to meet their personal needs rather than reflect market value. Evidence of this, in addition to claimant's starting off at a salary of $52,000 per year after having been paid nothing until 1997, is that claimant's wife's salary dropped once claimant started getting paid, despite MTM's increasing business.

and shall apply to future payments under the stipulation.

2. Claimant is entitled to continuing medical benefits arising from the injury to his back on January 5, 1976.

_____

JEFFREY TURECK
Administrative Law Judge